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NO. 1154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JACKIE LONGFELLOW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on February 13, 1969.

CITATIONS TO OPINIONS BELOW

The Per Curiam opinion of the Fourth Circuit Court of Appeals is attached hereto in its entirety as Appendix A to this Petition and is as yet not reported. The Judgment of the Fourth Circuit is attached as Appendix B.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

Whether the rule established by this Court in *Michelson* v. *U. S.*, 335 U. S. 469 (1948) as applied in the instant case, constituted a denial of due process of law, a denial of the Petitioner's right to remain mute, a denial of the Petitioner's right to cross-examine and confront witnesses, and a denial of the right to be informed of that with which one is charged under Amendments V & VI of the United States Constitution.

STATEMENT[1]

Jackie Longfellow, hereafter referred to as Petitioner, was convicted of two counts of receiving and transporting stolen goods in interstate commerce on March 7, 1968, and on April 1, 1968, was sentenced to five years on each count, to run concurrently.

The Petitioner challenged the right of the Government to cross-examine his character witnesses by reference to rumors and thus the doctrine announced by this Court in *Michelson* v. *U. S.*, 335 U. S. 469, 93 L. ed. 168, 69 S. Ct. 213, was brought into issue.

Herbert H. Matheny, who had sold many large and expensive trucks to Appellant, testified as to the excel-

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[1]All references are to the printed joint appendix.

lent character of Appellant, as did his insurance man, Sherman I. Vealey. The following questions were permitted upon cross examination under the Rule of *Michelson, supra:*

> "Q. Mr. Matheny, have you heard that the defendant Jackie Longfellow is married? (6a)
>
> "Q. Mr. Matheny, have you heard that Jackie Longfellow and his brother Eddie Longfellow have been indicted in this Court recently for receiving, concealing, storing and disposing of a Fruehauf trailer and 30,000 pounds of fresh hams valued at approximately $10,000, which property was moving in interstate commerce, then knowing said property to have been stolen? (13a-14a)
>
> "Q. Mr. Matheny, have you heard that Jackie Longfellow has recently been indicted in this Court for receiving, concealing, storing and disposing of a black and red 1957 Autocar tractor which was moving in interstate commerce, knowing the said motor vehicle to have been stolen? (14a)
>
> "Q. Mr. Matheny, have you heard that Jackie Longfellow was dating and being intimate with women other than his wife? (14a)
>
> "Q. Mr. Matheny, have you heard that Longfellow has supplied for the use of Evelyn Backus a 1959 red and cream Cadillac coupe, West Virginia license number 439-973?" (14a and 15a)

The same basic questions, answered in the negative, were asked each witness. Counsel, of course, moved for a mistrial in advance and at each appropriate place during the questioning and answering process. There was no proof of these matters put to the jury.

Thus, the issue is two-fold: (1) Is the *Michelson* Rule, as promulgated by the Supreme Court of the United States, basically unconstitutional in that it permits injection of issues into a trial involving an invasion of Appellant's constitutional rights to remain silent, to be advised of that of which he is charged and upon which he is to be tried, and other denials of due process and like rights under the Constitution, and, (2) If the *Michelson* Rule be constitutional was its application in this case excessive, and thereby prejudicial?

REASONS FOR GRANTING THE WRIT

Counsel urges the abolition of the *Michelson* doctrine. This Court, when adopting it in 1948, stated the following:

> "We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy systen when moderated by discretionary controls in the hands of a wise and strong trial court." (93 L. ed. 179)

Thus, the Court very begrudgingly adopted the rule from which the Appellant has suffered. The Court's stated reason, also at 93 L. ed. 179, was as follows:

> "To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.
>
> • • •

> "The confusion and error it would engender would seem too heavy a price to pay for an almost imperceptible logical improvement, if any, in a system which is justified, if at all, by accumulated judicial experience rather than abstract logic."

Justice Rutledge and Justice Murphy dissented in the *Michelson* case, pointing out the lack of logic of the majority decision. They pointed out the following:

> "in the guise of 'testing the standards of the witness' when he speaks to reputation, the door has been thrown wide open to trying the defendant's whole life, both in general reputation and in specific incident. What is worse, this is without opportunity for the defendant to rebut either the fact or the innuendo for which the evidence is tendered more generally than otherwise." (93 L. ed. 182)

The two dissenters go on to point out the potential damage, prejudice and danger, as also referred to by the majority opinion in Footnote 4, to the majority opinion, at 93 L. ed. 182 of the dissent, where they recite Mr. Wigmore's classic summary upon the subject, as follows:

> " 'The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise had if the rule had allowed

that conduct to be made the subject of an issue.' Wigmore, Evidence 3d ed 1940 § 988.

"These consequences are not denied. But it is said two modes of protection are available to the accused. One is to refrain from opening the inquiry into his reputation. That answer would have weight if the rebuttal were limited to inquiry concerning the witness' opportunity for knowing the accused and his reputation and to producing contrary evidence by other witnesses of the same general sort as that which is refuted. But if the rule is sound which allows the accused to show his good repute and restricts him to that showing, it not only is anomalous, it is highly unjust, to exact, as the price for his doing so, throwing open to the prosecution the opportunity not only to rebut his proof but to call in question almost any specific act of his life or to insinuate without proving that he has committed other acts, leaving him no chance to reply. A fair rule either would afford this chance or would restrict the prosecution's counterproof in the same way his own is limited. The prevailing rule changes the whole character of the case, in a manner the rules applying to the two earlier stages seek to avoid."

The dissenting judges summarized their view as to the proper way to handle the matter in the following two quotations from 93 L. ed. 184:

"* * * But it is put in generally, and I think was put in evidence in this case, not to call in question the witness' standard of opinion but, by the very question, to give room for play of the jury's unguarded conjecture and prejudice. This is neither fair play nor *due* process. It is a perversion of the criminal process as we know it. For it permits what the rule applied in the first stage forbids, trial of the accused not only

for general bad conduct or reputation but also for conjecture, gossip, innuendo and insinuation.

* * *

"My own preference and, I think, the only fair rule would be to foreclose the entire line of inquiry concerning specific incidents in the defendant's past, both on cross-examination and on new evidence in rebuttal. This would leave room for proper rebuttal without turning the defendant's trial for a specific offense into one for all his previous misconduct, criminal or other, and would put the prosecution on the same plane with the defendant in relation to the use of character evidence. This, it seems to me, is the only fair way to handle the matter."

If the Court is not of the opinion to reevaluate the propriety of the *Michelson* Rule at this time, the question then remains whether the manner in which it was here applied was prejudicial to the Appellant in this case. It would seem only fair, in view of the begrudging manner in which this Court adopted the rule in the first place, and the dangers recited by this Court in its opinion, that the application of the rule should be very carefully supervised.

Michelson was being tried in 1947 for bribing a federal revenue agent. He called character witnesses. His own counsel brought out the conviction of a misdemeanor in 1927. On cross examination character witnesses were asked if they had heard this and were further asked if they had ever heard that the defendant had been arrested on October 11, 1920, for receiving stolen goods. None of the witnesses had heard the latter.

The Trial Judge specifically instructed the jury and sternly cautioned them concerning the correct manner in which they should consider such cross examination. These admonitions by the Trial Judge are found at 93 L. ed. 172. The entire footnote 3 containing the Judge's remarks are copied here for emphasis:

> "In ruling on the objection when the question was first asked, the Court said: '... I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested. Is that clear?'
>
> "In overruling the second objection to the question the Court said:
>
> " 'Again I say to the jury there is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920, there isn't any such proof. All this witness has been asked is whether he had heard of that. There is nothing before you on that issue. Now would you base your decision on the case fairly in spite of the fact that that question has been asked? You would? All right.'
>
> "The charge included the following:
>
> " 'In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for recieving stolen goods. I tried to give you the instruction then that that ques-

> tion was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideration only in weighing the evidence of the character witnesses."

The attention of the Court is invited to the fact that the Trial Judge in *Michelson* actually engaged in a colloquy with the jury and elicited from them their affirmance that they would not base their decision on the fact of the rumors. This was not done by the Trial Judge in the instant case. The Trial Judge in the instant case simply paraphrased the precautionary charge given by the Judge in the *Michelson* case at the time the evidence was presented (13a) and during the charge to the jury. (23a-24a) Appellant urges that the charge of the Trial Court was far less specific and curative than in *Michelson* and our Trial Judge's charges are reproduced here for purposes of emphasis and comparison.

The Trial Judge in the instant case at the taking of evidence stated: (13a)

> "THE COURT: Mr. Upton, before you proceed I want to make one statement to the jury.
>
> "Ladies and gentlemen, the examination that Mr. Upton is conducing now is happening for this reason: The defendant through his counsel has inquired of Mr. Matheny as what we call a character witness, and the basis for evidence

given by a character witness is the reputation of a defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may then ask the witness if he has heard of various incidents in the life or the career of the defendant.

"Regardless of the answer of Mr. Matheny to these questions, you are not to assume that the incidents asked about actually have taken place. All that is happening is that this witness's standard of opinion of the reputation of the defendant is being tested through these questions posed to him on cross-examination by the government."

The following is the charge of the Trial Judge in the instant case at the time of the official charge: (23a-24a)

"In connection with this character evidence, on yesterday I permitted certain questions to be asked of the character witnesses. I tried to give you the instruction then that those questions were permitted only to test the standards of character evidence that these character witnesses seemed to have. There is not any proof in the case that could be produced before you legally within the rules of evidence that the defendant was actually guilty or had engaged in such conduct, and you are not to hold any implications of those questions against the defendant, nor are you to assume what the consequences of those incidents might be. You just put that from your mind and consider it for one purpose only, and that is in passing upon the quality of the opinion given by the two witnesses who testified as to the defendant's reputation and character."

It is submitted that a comparison of the above indicates the greater likelihood of confusion in Appellant's

case than occurred in the *Michelson* case, and that no juror, and few lawyers, would have been able to put the questions asked in the instant case in proper perspective.

In addition, the quality of the questions in the instant case are exceedingly prejudicial. The questions asked in essence involve the following:

1. Have you heard the defendant is married? (6a)

2. Have you heard that he and his brother have been indicted in this Court for receiving, concealing, storing and disposing of a truck and $10,000 worth of interstate commerce merchandise? (13a-14a)

3. Have you heard that defendant has recently been indicted for receiving, concealing, storing and disposing of an Autocar tractor from interstate commerce? (14a)

4. Have you heard that defendant was dating and being intimate (the only fair inference being that he was sleeping with) women other than his wife? (Attention is invited to the fact that the plural "women" is used.) (14a)

5. Have you heard that defendant gave a red and cream Cadillac coupe to Evelyn Backus, West Virginia License Number 439-973? (Attention is invited to the specific use of the license number which could only mean to the jury that the Government could prove this fact if only it were permitted to do so.) (14a and 15a).

It is submitted that it is obvious from the above that the evils and possibilities recognized by this Court in *Michelson, supra*, have clearly occurred in this case.

To further aggravate matters and underline the unfairness of the *Michelson* Rule, the Trial Judge denied counsel the right on redirect examination to establish with Mr. Matheny that he had credit reports and references made concerning the defendant because he was selling him equipment in which tens of thousands of dollars were involved. It would only have been fair if the Government could ask specific instances of rumors as they might bear on the quality of the witness's judgment as to reputation that the witness could then tell the jury the extent to which he had gone to ascertain the facts and circumstances upon which his opinion was based.

In addition, and as an added error in terms of the overall picture, the attempt was made not to ask Mr. Matheny to explain specific instances of character, reputation, and credit checks, *but merely the fact that they had been done* and this opportunity and right was denied to the Appellant. (Attention is invited to the entire testimony of Mr. Matheny which is found at 4a-15a, and particularly the comment of Mr. Daugherty at 20a, paragraph 4 and 5 indicating an avowal of the type of testimony Appellant was prepared to offer through Mr. Matheny and Mr. Vealey if permitted to do so on redirect examination.)

The testimony of Mr. Vealey to the same effect as above and which raises the same questions is found at 16a-19a.

It is most respectfully urged that this case present a classic example of the lack of logic in the *Michelson* Rule and shows the logical extension to which the Rule may be taken in terms of total deprivation of due pro-

cess and it is urged that this case be reviewed based on the following:

1. That the *Michelson* Rule is unconstitutional; and,

2. As applied here the *Michelson* Rule deprived this particular Appellant of due process of law and many other basic constitutional guarantees.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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